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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 127

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Eighth Circuit

and

BRIEF IN SUPPORT.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner, The Seven Up Company, prays that a writ of certiorari issue directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of record of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 12,955, Civil, The Seven Up Company, appellant, v. Cheer Up Sales Company of St. Louis, Missouri, a corporation, et al., appellants, or so much thereof as is necessary for consideration of the question involved in this petition, to the end that this case may be reviewed and determined by this court as provided for by the Statutes of the United States.

Your petitioner respectfully shows:

STATEMENT.

There is but a single question involved in this petition, and on that question there is a conflict between the decision in this case and a decision of the Circuit Court of Appeals for the Sixth Circuit, as well as other decisions in other circuits. The question is "what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court."[1] On this question the lack of uniformity has been noticed recently in this court[2] and the conflict is brought into sharper focus by the more recent decision by the Circuit Court of Appeals for the Eighth Circuit, toward which this petition is directed.

The rule applied in the present case is stated by the court in its opinion as follows (R. p. 76):

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is *clearly demonstrated*[3] that the interests of justice will *undoubtedly* be served thereby."

In contrast the applicable rule in the Sixth Circuit has been stated in *Ergy Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, as follows:

> "The rule is that, whenever the right to file a bill *is at all doubtful, leave is granted as a matter of course.* This does not necessarily involve any consid-

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1 *Hazel Atlas Glass Co. v. Hartford-Empire Company*, 322 U. S. 238, 271 (in the dissenting opinion).

2 *Ibid.*

3 Italics within quotations throughout indicate emphasis supplied by petitioner.

eration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

The diametric difference between these two rules applied respectively in the two circuits on the same subject is quickly apparent. In the Eighth Circuit the showing to support a petition for leave must amount to a clear demonstration beyond a reasonable doubt; while in the Sixth Circuit the presence of any doubt warrants granting the leave. In the Eighth Circuit under the announced rule, the petitioner, in order to have his petition heard, must establish his case without the examination of witnesses in open court, without opportunity to cross-examine opposing witnesses, without the benefit of the rules relating to discovery, and without the other circumstances incident to the usual procedure. But in the Sixth Circuit the right to a hearing by orderly procedure on the bill is not denied unless the "lack of merit is obvious."[4]

The rule of decision of the Sixth Circuit has been adopted in the Third Circuit.

A second rule of decision on the same subject, but differing substantially from both the present rule applied in the Eighth Circuit and the rule of the Sixth and Third Circuits, is applied in the First, Fourth, Fifth, Seventh and Ninth Circuits and by the Court of Appeals for the District of Columbia. It is essentially that the showing should present a *reasonable probability* that the new evidence will lead to a different result.

The question arises from a decision of the Circuit Court of Appeals for the Eighth Circuit (R. pp. 73-78), reported *The Seven Up Company v. Cheer Up Sales Co.*, 153 F. 2d 231, on a petition by The Seven Up Company for leave to file a bill of review in the District Court, in a case theretofore decided by the Circuit Court, reported *The Seven*

[4] *Hazel Atlas Glass Co. v. Hartford-Empire Company*, 322 U. S. 238, 271.

Up Company v. Cheer Up Sales Co., 148 F. 2d 909 (R. pp. 1-9).

The declaration of the rule, which is at variance with the rule in other circuits, was clearly announced as the rule of decision of the case. It was stated as the rule applicable to the issues and the one upon which the court undertook to decide the case on the facts presented. Those facts are summarily stated here, not for the purpose of laying a foundation for an argument on the merits, but for the purpose merely of setting forth the circumstances, unimportant in themselves in a consideration of this petition for a writ of certiorari. The important element is that here the Court of Appeals for the Eighth Circuit applied a rule of decision at variance with other circuits, and denied petitioner a remedy in equity where the remedy would have been allowed elsewhere.

Petitioner, as plaintiff, brought its original suit in the District Court for the Eastern Judicial District of Missouri, alleging infringement of its registered arbitrary trade-mark "Seven Up" or "7 Up" by respondents' mark "Cheer Up," both used on a lithiated lemon-lime soda, and for unfair competition in the use of a confusingly similar package or bottle. Petitioner then being uninformed as to any practice of palming off by respondents' dealers, relied wholly, as it had a right to rely, upon the similarities in appearance of the marks and the bottles to support its complaint. The Circuit Court of Appeals, in affirming[5] a dismissal of the complaint by the District Court, commented with some repetition upon the absence of evidence of palming off and confusion and drew inferences from the absence of evidence on the point (R. pp. 5, 8).

Immediately following the original decision of the Circuit Court, and still without any knowledge of palming off by respondents' dealers, but merely to determine what the

[5] *The Seven Up Company v. Cheer Up Sales Co.*, 148 F. 2d 909, certiorari denied Oct. 8, 1945, ... U. S. ...

facts were, an extensive investigation was made to determine the disposition of respondents' dealers when they were freed from a caution imposed by the pending case (R. p. 6). Respondents' counsel admitted in oral argument on the petition for leave before the court that their dealers, or at least their bottlers, were promptly informed of the decision. We say "immediately following" because the decision was rendered on April 26, 1945 (R. pp. 1, 10), and arrangements for the investigation had been completed three days later, or April 29, 1945 (R. pp. 20, 21).

That investigation covered principal cities in several states. The results were amazing: approximately one-half of respondents' dealers who were sampled delivered or served respondents' "Cheer Up" without explanation when "7 Up" was ordered (R. pp. 21, 30). Such a course of conduct cannot exist as a pattern and will not be continued unless successful, nor could it be successful unless it were aided by the similarities in names and packages, and these similarities are provided by respondents.

The results of the investigation were summarized by affidavits in support of the petition for leave to file a bill of review (R. pp. 19, 27). Permission was thereby sought to supplement the original complaint to present the issue of palming off and in support thereof to introduce evidence of these facts which had occurred subsequent to the decision of the case (R. pp. 15, 16).

In denying the petition, the court in its opinion stated its conception of the applicable rule, as quoted above, and proceeded to summarize its findings and subordinate conclusions upon which it based its decision (R. pp. 73, 78).

These are—

First, "The exercise of reasonable diligence would have suggested an investigation of the facts prior to the trial." But the facts all occurred subsequent to the trial, and there

is not a scintilla of evidence that similar facts existed prior to the decision.

Second, "But had the evidence now available been discovered and offered upon the trial it would not have affected the result." But this is not only error, and a usurpation of the jurisdiction of the District Court, but also contrary to the rule of the case announced in the original opinion.[6]

Third, "The professional investigators employed by the petitioner * * * were not deceived." But that finding is immaterial to any issue presented by the petition for leave and ignores the actual relevancy of the facts uncovered by the investigators.

Fourth, "Their reports are disputed." And in this an unessential and critical difference between the rule at present announced in the Eighth Circuit and the rule in the other circuits is most pronounced. For in the Eighth Circuit, the requirements are that the case on presentation of the petition for leave without aid of discovery, subpoena and examination of witnesses, and cross-examination of opposing witnesses, must be made out to a clear demonstration beyond a reasonable doubt. Elsewhere, probable cause only sufficient to create a doubt need be shown in order that the petitioner may pursue his remedy.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 4, 1946 (R. pp. 77-78). Petition for rehearing, timely filed by petitioner (R. pp. 79-112), was denied on March 5, 1946 (R. p. 113).

Jurisdiction of the District Court under the original cause and the petition for review is invoked under the Trade-Mark Laws of the United States, and more particu-

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[6] Cf. *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 246-247.

larly *U. S. Code,* Title 15, §§ 97 and 102, and Title 28, § 41 (7). Since the charge of unfair competition includes trade-mark infringement there is substantially a single cause of action, and jurisdiction of the federal court is supported by *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.,* 305 U. S. 315, 325, 336. Jurisdiction of this court is invoked under § 240 of the *Judicial Code* as amended, *U. S. Code,* Title 28, § 347 (a) and Title 15, § 98, and is supported by *Hazel Atlas Glass Co. v. Hartford-Empire Co.,* 322 U. S. 238.

Statutes Involved.

The question presented does not involve directly the interpretation of any statute of the United States.

The Question Presented.

The question presented is what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court.

The Reason Relied on for Granting the Writ.

The Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter, and more particularly with one rule of decision exemplified by an opinion of the Circuit Court of Appeals for the Sixth Circuit, *Egry Register Co. v. Standard Register Co.,* 1 F. 2d 11, 12, and a different rule of decision followed in several other circuits, exemplified by *In re Gamewell Fire-Alarm T. Co.* (C. C. A. 1), 73 F. 908, 913.

Wherefore, petitioner respectfully submits its petition for writ of certiorari.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. pp. 76-77) is reported *The Seven Up Company v. Cheer Up Sales Co. of St. Louis, Mo., et al.*, 153 F. 2d 231.

JURISDICTION.

The jurisdictional statement appears in the Petition for the Writ of Certiorari.

STATEMENT OF THE CASE.

The essential facts are set forth in the Petition.

Errors Relied Upon.

Upon allowance of the writ, petitioner will rely upon the following errors of the Circuit Court of Appeals:

1. The court erred in denying petitioner's petition for leave to file its bill of review in the trial court in that it applied an erroneous rule or test, stated in the opinion as follows: "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby."

2. By applying said erroneous rule, the court erred in finding and holding, "The exercise of reasonable diligence would have suggested an investigation of the facts prior to the trial."; in that, since the facts relied upon to support the proposed bill all occurred subsequent to the trial, and

there is not a scintilla of evidence that similar facts existed prior to the decision, the court based its finding upon a mere supposition that such facts did exist previously, and required of petitioner not merely reasonable diligence but a practice of the art of divination.

3. By applying said erroneous rule, the court erred in finding and holding, "But had the evidence now available been discovered and offered upon the trial it would not have affected the result."; in that the said holding is a usurpation of the jurisdiction of the District Court and, being contrary to the rule of the case announced in the original opinion, is, therefore, based upon a different and more stringent test or rule of decision than was applied originally or than should be applied on such a petition for leave.

4. By applying said erroneous rule, the court erred in considering the fact, "The professional investigators employed by the petitioner * * * were not deceived," because, under a proper rule, such fact would be wholly immaterial to any issue presented by either the petition for leave or the proposed bill of review, and the finding ignores the force and relevance of the facts uncovered by the investigators.

5. By applying said erroneous rule, the court erred in considering the fact or finding, "Their reports are disputed," because under a proper rule, this is not ground for denying a petition for leave and the jurisdiction for resolving disputed facts is in the trial court alone.

ARGUMENT.

Summary.

"On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform."

That lack of uniformity is brought into clearer focus by the present decision, which announces and applies a rule requiring such showing to amount to a clear demonstration beyond a reasonable doubt.

This rule or test differs from two distinct rules, or patterns of decision, applied in other circuits, which also differ materially one from the other. In the one pattern (Sixth and Third Circuits) "Whenever the right to file a bill is at all doubtful, leave is granted as a matter of course." In the other pattern (First, Fourth, Fifth, Seventh, Ninth and Dist. of C.) the sufficiency is measured by the "reasonable probability" of a changed result.

Foreword.

A single question is involved in this petition and a single ground relied upon for granting the writ. The argument, therefore, is limited to a single point: The decision is in conflict with the decisions of other circuit courts of appeal on the same matter.

The question presented is what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review.

The rules of decision of the several circuit courts of appeal on this subject fall into three distinct patterns:

1. The present decision of the Circuit Court of Appeals for the Eighth Circuit, holding that the leave should be

granted "only in cases where it is clearly demonstrated that the interest of justice will undoubtedly be served thereby."

2. The rule in the Sixth and Third Circuits: "Whenever the right to file a bill is at all doubtful, leave is granted as a matter of course."

3. The rule in the First, Fourth, Fifth, Seventh and Ninth Circuits and the Court of Appeals for the District of Columbia: That the alleged newly discovered evidence would probably lead to a different result.

The lack of uniformity of decision on the question has been noticed recently by members of this court. In the dissenting opinion in *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 271, it is said:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform."

While this statement is taken from a dissenting opinion, it is a statement of fact about which in that case there was no division between the justices. That the majority of the court also recognized the lack of uniformity is indicated by the following discreet language in their opinion (322 U. S., l. c. 248):

> "The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, *is not just a ceremonial gesture.* The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a *proper discretion* reject the petition, in which case a bill of review cannot be filed in the lower court."

Certainly it is a correct statement of the facts, as will be demonstrated by a later consideration of the authorities. That lack of uniformity has been brought into sharper focus by the decision in the present case, which not only differs from the decisions on the same subject in other circuits but does in fact establish a rule which is unique in itself and differs from already diverging opinions.

The Rule of the Present Decision, Eighth Circuit.

In considering the rule announced by the Circuit Court of Appeals for the Eighth Circuit in the present case, we may point out the nature of the decision, how that decision differs from the rule prevailing in the other circuits, and incidentally its apparent genesis. The origin of the announced rule is interesting since the court has departed from the "reasonable probability" rule as it had existed in the Eighth Circuit and as it exists in several of the circuits. This departure has been toward a stricter requirement of the petitioner to support his petition for leave. This may be compared to the Third Circuit, which has also departed from the "reasonable probability" rule, and has followed the rule in the Sixth Circuit where the requirements of the petitioner are the least exacting.

To repeat, the rule applied in the present case is stated by the court in its opinion as follows:

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is *clearly demonstrated* that the interests of justice will *undoubtedly* be served thereby."

The effect is to require of the petitioner a clear demonstration beyond a reasonable doubt as a precedent to the

allowance of a petition for leave. That is to say, a petitioner without the right "to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards,"[7] is placed under the heavy duty of demonstrating the justice of his cause clearly and beyond a reasonable doubt.

Considering the fact that the court comments disparagingly upon the fact that petitioner's evidence is disputed, the rule would seem to mean that petitioner must demonstrate his position to the point that it will be impossible to dispute it.

The rule in the Eighth Circuit was at one time substantially in conformity with that rule now prevailing in a number of other circuits, but not universally; that is, it followed the reasonable probability rule.

In *Irvin v. Buick Motor Co.* (C. C. A. 8), 88 F. 2d 947, 951, the rule is stated as follows:

> "Newly discovered evidence, in order to move a court in granting a new trial, or in sustaining a bill in the nature of a bill of review, must be competent and relevant to the issues and such, and of such weight and nature, as that if added to the evidence already in the case *would reasonably and probably serve to change* or reverse the judgment or decree attacked."

In *Bosley v. Wirfs* (C. C. A. 8), 20 F. 2d 629, the court said:

> "But we are not deciding, *nor have we the jurisdiction now to decide,* what the effect of this oral evidence which the appellants seek to introduce may or will be, if received. We are now called upon to decide, and we do decide, only that the affidavits are such that they furnish *reasonable ground* for this court to per-

[7] Quoted from *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 271.

mit the appellants to make a motion in the court below to open the case for the purpose of presenting to that court evidence of the prior use the appellants claim."

In *Atchison, T. & S. F. Ry. Co. v. United States* (C. C. A. 8), 106 F. 2d 899, 902, the test is stated as follows:

> "These facts should be supported by affidavits of witnesses competent to testify to them, so as to enable the court to determine whether the newly discovered evidence when produced will be material to the issue and of such character *as probably to change the result.*"

In *Obear-Nester Glass Co. v. Hartford-Empire Co.* (C. C. A. 8), 61 F. 2d 31, 34, the measure applied was whether the new evidence "would probably produce a different result." This test, "probably produce a different result," is repeated, l. c. 35.

In looking for the genesis of the new rule and the departure from the old, we find in the last mentioned case, *Obear-Nester Glass Co. v. Hartford-Empire Co.*, 61 F. 2d, l. c. 34, substantially the same language, but the language there was in the nature of dicta and apparently related to the allowance of the bill of review by the trial court upon a complete showing and after an orderly trial of the issues according to established standards. This later statement is made because, as shown in the preceding paragraph above, the court in its decision on the petition for leave applied the test not of a clear demonstration beyond a reasonable doubt, but whether the newly discovered evidence "would probably produce a different result."

Going back in the authorities we find that the antecedent of this statement probably is an opinion by Justice Story, in *Wood v. Mann.*, F. Cas. 17953, 30 F. Cas., l. c. 458, where the following language is found:

> "I have thus gone over the principal cases (with an

> exception which will presently appear), which seem to me to be applicable to the more general question before the court. The result has been already incidentally suggested. But I will give it a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the court from allowing the introduction of *newly discovered evidence of witnesses to facts in issue in the cause,* after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances, which demonstrate it to be indispensable to the merits and justice of the cause."[8]

An examination of the case, *Wood v. Mann, supra,* shows that this language was not used with reference to bills of review generally, and of course was not used with reference to a petition for leave addressed to an appellate court. It was used only in the limited circumstances where a bill of review was sought to introduce newly discovered oral evidence of specific facts which had already been in issue in the cause. Such a state of facts was clearly distinguished by Justice Story from a bill of review based on newly discovered documentary evidence, newly discovered facts, or facts which had arisen since the decree.

So far, therefore, as petitioner can find this rule is novel and is borrowed from a rule applicable only to courts of original jurisdiction, and to a particularly limited type of newly discovered evidence, that which is oral and relating to specific facts already in issue.

It is clear, therefore, that the court has departed from the reasonable probability rule formerly used in the Eighth Circuit and now used in a number of other circuits, and has adopted the most stringent rule which was applied originally in American jurisprudence only to cases in-

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[8] The last sentence is quoted in *Craig v. Smith*, 100 U. S. 226, 233-234, where it is applied to the same purpose as used by Justice Story.

volving "newly discovered evidence of witnesses to facts in issue in the cause," as distinguished from newly discovered facts not theretofore in issue, and then only by the trial court after a full hearing.

The Rule in the Sixth and Third Circuits.

In the Sixth Circuit, *Egry Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, the following rule is stated and applied:

> "The rule is that, *whenever the right to file a bill is at all doubtful, leave is granted as a matter of course.* This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

In the Third Circuit, in *Raffold Process Corporation v. Castanea Paper Co.*, 105 F. 2d 126, 129, the above extract from *Egry Register Co. v. Standard Register Co., supra,* is copied and stated to be the applicable law.

Later in the Third Circuit, in *Pittsburgh Forgings Co. v. American Foundry Equipment Co.*, 119 F. 2d 619, in granting leave to file a bill of review the Court of Appeals said:

> "We say again, however, what we stated in the case of Raffold Process Corporation v. Castanea Paper Co., 3 Cir., 105 F. 2d 126, 129, quoting with approval the opinion in Egry Register Co. v. Standard Register Co., 6 Cir., 1 F. 2d 11, 12, viz.: 'The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course. This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same.' "

This makes it clear beyond any doubt that the Third Circuit has adopted the rule of the Sixth Circuit. This is

of some interest because originally that circuit followed a rule comparable to the "reasonable probability" rule. In *Eclipse Machine Co. v. Harley-Davidson Motor Co.*, 286 F. 68, 69, it was held that the new evidence must be "of a character sufficiently decisive on the merits to move the court in its discretion." We have then the illustration of one circuit, the Third, abandoning a rule which may be said to occupy the middle ground and move in a direction toward greater liberality in granting leave, while the Eighth Circuit in the present case has abandoned substantially that same middle ground and moved in the opposite direction toward extreme strictness in granting the leave. Or, in other words, the Third Circuit has moved from the position that the showing must be "of a character sufficiently decisive on the merits to move the court in its discretion," to the position that leave will be granted unless the lack of merit is obvious or unless the lack of merit is free from doubt. And now the Eighth Circuit moves from the middle position, that the showing should be such as to "furnish reasonable ground," to a position requiring that the showing shall be a *clear demonstration beyond a reasonable doubt.*

Reasonable Probability Rule, First, Fourth, Fifth, Seventh and Ninth Circuits and D. of C.

The rules in these several circuits seem to have a common ground, and that is that the showing should be sufficient to indicate a reasonable probability that the newly discovered evidence would produce a different result.

In the First Circuit, *In re Gamewell Fire Alarm Tel. Co.*, 73 F. 908, 912, 913, held that the question of materiality was for the appellate court, and that question was decided on the basis of "reasonable probability" while the question of laches would ordinarily be for the decision of the court below.

In *Bresnahan v. Tripp Giant Leveller Co.* (C. C. A. 1), 99 F. 280, 284, the rule is applied in the following language:

> "There are some cases where it is held that, if the claim is made that newly-discovered evidence or patents anticipate the patent previously sustained upon bona fide and strenuous contest, the anticipation must be described in full, clear, and exact terms. We do not consider it necessary to resort to this extreme rule, but are disposed to consider whether the situation now presented, which involves the prior determinations and adjudications, together with the old and the new evidence, presents a case *which fairly calls for a result different* from that heretofore reached in the circuit court and in the circuit court of appeals."

In the Fourth Circuit, *Suhor v. Gooch*, 248 F. 870, 871, the test is stated as follows:

> "The recognized condition of the leave to file a bill of review is that the appellate court must be convinced (1) that the alleged newly discovered evidence would probably lead to a different result, and (2) that due diligence was used to discover it before the trial."

The Fifth Circuit, in *Allis-Chalmers Mfg. Co. v. Columbus Electric & Power Co.*, 22 F. 2d 737, 739, finds the rule as follows:

> "In cases of this kind, it is well settled that leave of the appellate court for permission to apply for a rehearing in the trial court will not be granted unless the newly discovered evidence is so persuasive as that it *probably* would induce a conclusion contrary to that on which the decree is based."

In the Seventh Circuit, *Glade v. Allied Electric Products, Inc.*, 135 F. 2d 590, 592, the rule is whether "the newly discovered evidence would *probably* produce a different result"; although that was on the question of an application to the District Court.

In the Ninth Circuit, *Carson v. American Smelting & Refining Co.*, 11 F. 2d 766, 771, the test is whether "the evidence is so controlling that it would *probably* induce a different conclusion." *Rown v. Brake-Testing Equipment Corporation*, 50 F. 2d 380, 381, is to the same effect.

The Court of Appeals for the District of Columbia, in *Davis v. Casey*, 103 F. 2d 529, 536, announces and follows the procedure of the First Circuit as stated in *In re Gamewell Fire Alarm Tel. Co.*, 73 F. 908, *supra*.

Conclusion.

The essence of the rule announced and applied in the present case is that a showing, sufficient to move an appellate court to grant leave to file a bill of review in the trial court, should amount to a *clear demonstration beyond a reasonable doubt*.

This is in conflict with two other rules of decision in other circuits which differ between themselves.

One rule of decision prevailing in the Sixth and Third Circuits is that, "Whenever the right to file a bill is *at all doubtful*, leave is granted as a matter of course."

The other rule of decision prevailing in a number of circuits is essentially that the showing should present a *reasonable probability* that the new evidence will lead to a different result.

In view of the clear conflict, the writ should be granted.

Respectfully submitted,

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